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No. 07-932

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IN THE

Supreme Court of the United States

STEVEN H. UNTRACHT, M.D., PH.D., F.A.C.S,
Petitioner,

v.

ERDEN FIKRI, M.D., ET AL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY

Having conceded that the decision below leaves no remedy for physicians or patients injured by sham peer review (Petition 29-30), for the following reasons the Respondents' vestigial arguments against a grant of certiorari are unavailing.

A. The Third Circuit violated its own holding on § 1981, affirmed by the Supreme Court in *St. Francis College v. Al-Khazraji*.

In the district court, the Respondents all argued in their summary judgment motions that:

> In order to state *a prima facie* case based on "reverse discrimination," the plaintiff must be able to produce sufficient evidence ... that the defendant treated plaintiff less favorably than others because of his race, color, religion, sex, or national-origin. *Iadimarco v. Runyon,* 190 F.3d 151, 161 (3d Cir, 1999).

Conemaugh Brief (Document 140) at 20-21, (emphasis added). *See also,* Lee Brief (Document 137) at 40 (same).

But now, for the first time, the Respondents seek to capitalize on their refusal to provide Rule 26(a)(1) disclosures by citing this Court's opinion in *St. Francis College v. Al Khazraji*, 481 U.S. 604 (1987), which established guidelines for claims under § 1981. *Id.* at 613. *St. Francis* reaffirmed the Court's long-standing position that, as Justice Brennan observed in his concurring opinion, "pernicious distinctions among individuals based solely on their ancestry are antithetical to the doctrine of equality upon which this nation is founded." *Id.* at 614.

The parties never disputed that Petitioner differs from Fikri, Murali, Mathur and Pai culturally, ethnically and religiously. The parties also never disputed that Petitioner further differs from Murali, Mathur and Pai in

skin color. Hence, there was never a dispute that Petitioner's pleading of national origin is synonymous with ancestry, as explained by Justice Brennan, and the Respondents never before asserted that Petitioner premised his § 1981 claim on "discrimination based on birthplace alone." *Id.* The very first time the Respondents asserted "'American birth' says nothing about a person's ethnicity" was in their brief to this Court, at 22. By refusing to supply Rule 26(a)(1) disclosures, the Respondents wrongfully deprived Petitioner of fair notice of this disingenuous defense and the opportunity to vitiate it before they moved for summary judgment. It is just such chicanery that the discovery rules were meant to avert. *See,* F.R.C.P. 37(c)(1), Petition 23.

In quibbling over birthplace *vs.* ethnicity, the Respondents cite how even two prominent men born in America, Abraham Lincoln and Frederick Douglas, evinced different ethnicities because they inherited different national origins—British for Lincoln, African for Douglas. Respondents' Brief ("RB") 22-23, n.5. Yet simultaneously they imply—knowing it factually wrong, and absurd—that four Respondents born in two vastly different Asian countries all magically share common ethnicity with American-born Petitioner! In contrast to the falsehood in RB at 22 (last paragraph), Petitioner's § 1981 claim rests not on his birthplace alone but, as the quote in RB 27 vividly evokes and as the Complaint (¶ 109) pointedly proclaims, "national-origin bias" (emphasis added) and foreignness, *viz.,* ethnicity.[1] Before being granted summary judgment, the Respondents should bear the burden to prove lack of ethnic diversity, a burden they did not and cannot meet.

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[1] Neither, in contrast to the assertion in RB 22 (last paragraph), did the courts below draw any semantic distinctions between birthplace, national origin and ethnicity. *See,* Pet. App. 1a-89a, especially 79a-80a and 81a.

Next, the Respondents argue (RB 23-24) that Petitioner failed to set forth any evidence of violation of his contractual rights. Indeed, the Petition (pp. 10-20) describes numerous instances (taken from the Complaint, ¶¶ 42, 46) of violations of hospital bylaws (and, hence, contract rights, *see* Petition 24-25), none of which the Respondents claim not to have been raised in the district court, none of which the Respondents denied and several of which the Commonwealth of Pennsylvania investigated and found true. Instead, the Respondents and the lower courts (Pet. App. 81a, n.19) simply ignored Petitioner's evidence summarily. In so doing, they had not provided any non-discriminatory reasons for these violations, vis-à-vis the burden-shifting rule of *McDonnell Douglas Corp v. Green,* 411 U.S. 792 (1973). The Respondents (RB 24) assert only that Petitioner "offered not one iota of evidence that the reasons given by the respective Hospitals for his dismissal were not the real reasons." This hollow statement ignores not only the details in the Petition, pp. 10-20, but also all of the evidence that persuaded *Amicus Curiae* to conclude that the miseries Respondents inflicted on Petitioner were a sham, intended to harm under false pretense. *See, Id.;* Petition 8-10, Pet. App. 107a *et seq.*

B. The Third Circuit's ruling on § 1983 violates longstanding precedent of the Supreme Court.

The Respondents defend against this assertion, notwithstanding their default on Rule 26(a)(1), first by stating that Petitioner "failed to raise the claimed § 1983 violation in the courts below." RB 19. Of course, the issue of state action vis-à-vis the the Health Care Quality Improvement Act ("HCQIA") was introduced in the Complaint itself, and the district court so acknowledged and adjudicated. Pet. App. 63a-64a, n.14. The issue was very much before the Third Circuit, having been emphasized by *Amicus Curiae* and reasserted by Petitioner in his reply brief, where he stated the same arguments concerning *Smith v. Allwright,* 321 U.S. 649 (1944) and *Terry v.*

Adams, 345 U.S. 461 (1953) that he later repeated in his Petition at 26. Respondents had ample opportunity to answer in the Third Circuit, as indeed they did.[2]

Next, Respondents argue that "[c]ompliance with a federal statutory mandate, however, does not convert the respondents' actions into state actions ..." RB 20. In sole support they cite *Wheeldin v. Wheeler,* 373 U.S. 647, 650, (1963), a case that never reached the issue of state action, because "Congress has not created a cause of action for abuse of the subpoena power by a federal officer, at least where the subpoena was never given effect ..." *Id.* Indeed, HCQIA operates largely through the laws of the States themselves. *See,* Petition 4, § 11111 (a)(1)(D). And in *Bivens vs. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), this Court extended §1983 liability to agents of the federal government acting under federal law. *See,* Pet. App. 129a, n.2.

Further, as the district court recognized, under § 1983 "liability attaches to those wrongdoers who 'carry a badge of authority of a [s]tate and represent it in some capacity.'" Pet. App. 64a. With HCQIA, Congress explicitly bestowed on hospitals powers theretofore exclusively reserved for the States: to declare physicians incompetent and "to restrict the ability of incompetent physicians to move from State to State." 42 U.S.C. § 11101, Petition 3, 7. Hence, with HCQIA Congress granted such a badge of State authority to the Respondents. By complying with HCQIA and filing defamatory reports in the Data Bank, the Respondents terminated Petitioner's career, a power previously reserved exclusively to the States. Under the public function test, this Court assigns state action to such private parties. *Marsh v. Alabama,* 326 U.S. 501,

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[2] Even under the limitations of the quote in RB 19, this Court would still ascribe state action. *See, New York Times Co. v. Sullivan,* 376 U.S. 254, 265 (1964) (using state courts to curb rights is state action).

506, 507 (1946) ("since their operation is essentially a public function, it is subject to state regulation ... mere acquiescence by the State in the [challenged conduct] would still have been performance of a public function, and discrimination would certainly have been illegal").

The Respondents then cite the Third Circuit's opinion in *Benn v. Universal Health System, Inc.*, 371 F.3d 165 (3d Cir. 2004) as precedent that even compliance with state law does not make a hospital a state actor for purposes of §1983! They failed, however, to discern the unique facts in *Benn*, where the Third Circuit found no state nexus only because, "[a]lthough the [law at issue] permits a physician or other 'responsible party' to file an application for an emergency [psychiatric] examination, we see nothing in the [law at issue] that compels or even significantly encourages the filing of an application." *Benn*, 371 F.3d at 171 (emphasis added). In material contrast to *Benn*, the Respondents all agree that HCQIA mandates Data Bank reporting. *See*, RB 20; *cf.*, 66a-67a.

The Respondents rely on other irrelevant cases, such as *Hodge v. Paoli Memorial Hospital*, 576 F.2d 563 (3d Cir. 1978), which held that a private hospital's receipt of Medicare, Medicaid and Hill-Burton funds, existence of tax exemption and state licensing requirements did not constitute state action for purposes of § 1983. Very clearly, however, private hospitals' compliance with the laws controlling these government programs does not govern their actions toward physicians, whereas HCQIA does. Contrarily, for example, in *Holton v. Crozer-Chester Medical Center*, 560 F.2d 575, 578 (3d Cir. 1977) (Social Security Act mandating provision of family-planning services means private hospital receiving Medicaid funds is state actor for refusing to sterilize woman), the Third Circuit very much held that actions taken directly pursuant to federal law are state actions.

C. Under the Fourteenth Amendment, the Respondents' willful default requires reversal and entry of judgment for Petitioner.

In addressing the claim that the unpublished opinion deprived Petitioner of equal protection of law, the Respondents explain procedure but neglect constitutionality. Nowhere do they answer the blatant illegality of the courts below having dismissed Petitioner's lawsuit on summary judgment after utter default by the moving parties. The Respondents do not deny that they refused to provide Petitioner with any discovery (other than reply with objections), nor do they claim that Petitioner failed to raise the discovery issue in the district court. "[T]hey have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." SUP. CT. R. 15.2. By itself, the Respondents' conceded refusal to disclose pursuant to Rule 26(a)(1) requires a default judgment for Petitioner. *See,* Petition 23.

Instead, the Respondents gloss the issue by stating that Petitioner "appears to contend that, by designating the decision in this case 'not precedential,' the Court of Appeals failed to give him any consideration at all." RB 27. Not so! Petitioner plainly contended that by designating the decision in this case "not precedential" the Third Circuit ruled that defendants may refuse to provide an adversary with all discovery and still have the case dismissed on summary judgment, under improper standards of review, but only for *Untracht v. Fikri et al* and no one else. Petition 23. Such is the extreme injustice of the unpublished opinion in this case, an injustice so repugnant that it begs for and—by precedent—deserves further review. SUP. CT. R. 10(a). Where, as here, the courts below "rejected petitioners' constitutional contentions with [] brief statements ..." this Court has found it necessary to grant certiorari. *New York Times,* 376 U.S. at 264; *cf.*, Petition 21-22.

Although the Respondents state that they "sent out timely discovery requests" (RB 15), they did so only after Petitioner served them with his discovery requests. (Document 118). Not until the Third Circuit did the Respondents first allege, falsely, that Petitioner only sought discovery at the last minute. RB 15-16.

At the district court's hearing on February 9, 2005, regarding Petitioner's motion to compel discovery, each of the Respondents concurred with UPMC's statement, "if certain defendants are no longer going to be in this case, they should not be subject to the discovery requests ... I would respectfully request that we get a ruling on the 12(b)(6) motions, and in the interim we just stay any discovery." Tr. 2/9/2005 (Document 127), p. 9. The district court then responded,

> I'm leaning toward deciding the [Rule] 12(b)(6) motions, staying discovery during that period ... And then perhaps at that point the issues in the case may have been narrowed somewhat anyway, and will perhaps allow discovery to be completed in a more expeditious manner. I think that will meet both concerns of the defendants and the concerns of the plaintiff.

Id., p. 13. The Respondents had not claimed that Petitioner demanded discovery untimely.

After the district court granted the Respondents' request for a stay, the Respondents refused to provide discovery even after the stay ended. They simply allowed the deadline to pass and immediately moved for summary judgment. In opposing the Respondents, Petitioner emphasized to the district court that he was denied all evidence needed to defeat the motions.

The Respondents then asked for and were granted the court's leave to respond to Petitioner's assertions. In

doing so, they stated only, "Plaintiff's repeated 'craving' for discovery to prove his claims does not obviate his requirement under the Federal Rules of Civil Procedure to properly plead factual allegations to support his various causes of action," and "Dr. Untracht's 'craving for discovery' in the hope of finding some evidence that would allow him to continue this litigation is not a proper response to defendant's [sic] summary judgment motion." (Document 155-1, p. 2, and Document 152, p. 16, respectively).

These were the last words before the district court dismissed all claims against the Respondents. Not once in the district court did any Respondent claim to lack time to respond to discovery requests or that Petitioner waived his rights, and never did any seek protective orders. Failure to provide discovery "may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c)." F.R.C.P. 37(d). *See also,* Rules 26(a)(1) and 26(e). If any of the Respondents' chameleonic excuses were not so embarrassingly farcical, neither the district court (Pet. App. 4a-89a) nor the Third Circuit (Pet. App. 1a-3a) would have failed to comment on the Respondents' refusal to grant discovery. With these failures, the courts below deprived Petitioner of equal protection of the discovery laws.

If the Kafkaesque statement of facts in RB 1-14 were true,[3] then the statements in Petition 18 n.5, certified by

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[3] The vexing comments about Dr. Jessup (RB 4) are typical of Respondents' misrepresentation of evidence throughout their submission. Dr. Jessup never stated that Petitioner "displayed poor judgment" with any patient. The two "fatalities" were not among the six cases that Fikri alleged to have engendered quality concerns. Petition 14-15. The first was that of a 71-year-old horribly frail man who, after four days in the ICU in cardiac and respiratory failure under Mathur's care, developed a bleeding giant duodenal ulcer that plunged him into shock. Mathur consulted Petitioner to handle the emergency, which

Conemaugh as true, are false! If the Lee Respondents did not sabotage Petitioner's electrocautery probe (RB 27),[4] they would have provided it to him for testing pursuant to his discovery request, and Fikri and Murali would not have refused to be deposed. If Pai and Fritz did not cause the death of Mr. E. with a lethal combination of intravenous medications, as Conemaugh's own hearing panel agreed (Document 147, Ex. 10, p. 2, items 1-2), they would not have refused to appear for cross-examination either at

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Petitioner promptly cured with a delicate operation one Sunday morning 12 years ago this month. Four days later and just three weeks shy of his leap-year 18th birthday, the patient died unexpectedly from, autopsy revealed, three tiny blood clots that dislodged from his legs and traveled to his lungs (so-called "pulmonary emboli"). On review, even the biased Surgical Quality Review Committee found no issues against Petitioner, who had instituted proper precautions against leg clots and embolism when he assumed the patient's care from Mathur. Dr. Jessup later believed that the method Petitioner used to prevent leg clots and embolism was not as effective as Dr. Jessup's method. The review committees, how-ever, found that Dr. Jessup was mistaken, because the standard surgical textbooks listed (and still do) the two methods as equally efficacious. (Document 155, pp. 8, 13). The other case is one that Dr. Jessup did not even review. He stated only that he was "not comfortable" in doing so because the patient was originally under the care of one of his Pittsburgh colleagues (where the patient suffered near-fatal surgical complications), and that perhaps the patient should have been referred back to Pittsburgh rather than treated in Johnstown, not knowing that the patient adamantly refused any transfers. Again, even Lee's committees found no quality issues with this case. (Document 155, pp. 8, 13-14). This 52-year-old man was the first to suffer because of Lee's then new policy of denying equal access of Petitioner's patients to its operating rooms. *See,* Petition 17.

[4] The Respondents did not deny any of the facts stated in the Petition, including those at 17 n.4 therein. *See,* SUP. CT. R. 15.2.

Conemaugh's hearing or at their depositions.[5] If Lee and Conemaugh didn't mind Petitioner learning about the illegal collusion fomenting between them when Conemaugh threatened Petitioner that he better accede to Lee's demands (Petition 19 n.6, 22 n.9), they would have complied with discovery, where this and many other probative bombshells would have emerged. Under the Third Circuit's own precedent of *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 867 (3d Cir. 1984), these explosive realities mandate a default judgment for Petitioner.

Quite simply, the Respondents refused to provide discovery because—like criminal defendants "taking the Fifth"—their deplorable conduct is intolerable in a civil society and they have much too much to hide. Under such ominous circumstances they resorted to the doctrine of "[w]ho controls the past controls the future ..." George Orwell, *Nineteen Eighty-four,* Pt. 1, Ch. 3. Now they seek to permeate and forever stain even this Court with their invidious Orwellian fog.

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[5] In contrast to the Respondents' assertion, Petitioner never alleged that "Conemaugh's anesthesiologists deliberately killed one of his patients out of professional jealousy ..." *Cf.*, RB 27 and Petition 19.

CONCLUSION

The Supreme Court should grant a writ of certiorari in this matter, or, in the alternative, a summary reversal.

Respectfully submitted,

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